TAN SEE SIONG & ANOR A

v.

HERMAN ANDO

FEDERAL COURT, PUTRAJAYA B
ALAUDDIN MOHD SHERIFF PCA
JAMES FOONG FCJ
HELILIAH MOHD YUSOF FCJ
[CIVIL APPEAL NO: 08(i)-178-2009(W)]
30 AUGUST 2010 C

CIVIL PROCEDURE: *Appeal - Appeal to Federal Court - Leave to appeal - Application for - Whether provision of s. 96(a) Courts of Judicature Act 1964 fulfilled - Whether application dismissed*

D

The plaintiff had instituted a writ action in the High Court against a housing development company (the defendant) for damages caused to his house which was adjacent to the land where the defendant was constructing. The plaintiff successfully obtained an interim injunction granted by Justice Azmel ('Justice Azmel's First Order'). E Dissatisfied, the defendant filed an appeal to the Court of Appeal (W02-207-04). Due to the failure of the defendant to comply with the mandatory order to repair the plaintiff's house, the plaintiff filed an application to commit the applicants (directors of the defendant) for contempt. But before this application could be disposed by the F court, the defendant's application to query Justice Azmel's First Order was heard and the same judge reviewed his previous decision and made a variation order ('Justice Azmel's Variation Order'). Dissatisfied with this, the plaintiff filed an appeal to the Court of Appeal (W02-1021-04). Subsequently, Justice Malik took over and G heard the contempt application against the applicants and found them guilty of contempt and ordered each to serve three weeks imprisonment and a fine of RM15,000 each ('Justice Malik's Order'). The applicants filed an appeal against this decision with the Court of Appeal (W02-34-07). Some four years after Justice H Azmel's Variation Order, the plaintiff filed an application to expunge Justice Azmel's variation order. This application was dismissed on the ground that the application fell short of O. 42 r. 13 Rules of the High Court 1980 ('Judicial Commissioner Yazid's Order'). Dissatisfied, the plaintiff appealed to the Court of Appeal. I The four appeals listed above were heard together and the following

were the decisions (i) the appeal against Justice Azmel's First Order was dismissed on the ground that the trial judge had applied the correct principles of law; (ii) the appeal against Justice Azmel's Variation Order was allowed on the ground that once the trial judge had pronounced his order he was *functus officio*; (iii) the applicants' appeal against Justice Malik's Order for contempt was dismissed on the ground that the trial judge had correctly arrived at a conclusion that there was contempt by the applicants and (iv) plaintiff's appeal against Judicial Commissioner Yazid's Order was allowed on the ground that there was merit on the plaintiff's complaint. The applicants applied for leave to appeal to the Federal Court under s. 96(a) of the Courts of Judicature Act 1964.

Held (dismissing the application for leave to appeal to the Federal Court)

Per James Foong FCJ delivering the judgment of the court:

(1) This application should be dismissed for the reason that it did not fulfil the provision of s. 96(a) of the Courts of Judicature Act. It is a well established law that a judge is *functus officio* once he has delivered his judgment. A party who is dissatisfied with this judgment can appeal against it. The said judge cannot vary his own judgment except under the 'slip rule' (O. 42 r. 5 of the Rules of the High Court 1980) or within the exceptions expressed in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd*. Neither of these exceptions applied. (para 20)

(2) Since Justice Azmel's First Order was effective, there was nothing to prohibit a subsequent judge to hear and dispose of the contempt proceedings against the applicants. Thus, Justice Malik's Order stood correctly made. Justice Azmel's First Order was not 'uncertain, vague or ambiguous'. It was clear and precise. Though the mandatory injunction was set aside by the judge who made it, the fact remained that his act was wrong *ab initio* and thus could not be sustained. (para 22)

(3) Since legal principles for the granting or refusal of an interim injunction are well established and fully discussed and applied by the courts below, there was no new question or law nor was there any question of public importance to regurgitate it. (para 23)

Bahasa Malaysia *Translation Of Headnotes* A

Plaintif telah memulakan tindakan writ di Mahkamah Tinggi terhadap sebuah syarikat pembangunan kawasan perumahan (defendan) bagi kerosakan yang melanda rumahnya yang bersebelahan dengan tanah di mana defendan sedang membina. B Plaintif berjaya memperolehi injunksi interim yang diberikan oleh Yang Arif Hakim Azmel ('Perintah Pertama Yang Arif Azmel'). Tidak puas hati, defendan memfailkan rayuan ke Mahkamah Rayuan (W02-207-04). Disebabkan kegagalan defendan untuk memenuhi perintah mandatori untuk memperbaiki rumah plaintif, plaintif telah C memfailkan permohonan untuk mengkomitkan pemohon-pemohon (pengarah-pengarah defendan) kerana menghina mahkamah. Tetapi sebelum permohonan tersebut dibicarakan di mahkamah, permohonan plaintif untuk pertanyaan mengenai Perintah Pertama Yang Arif Azmel dibicarakan dan hakim yang sama menyemakbalik D keputusannya yang dahulu dan membuat perintah pemindaan ('Perintah Pemindaan Yang Arif Hakim Azmel'). Tidak puas hati, plaintif memfailkan rayuan kepada Mahkamah Rayuan (W02-1021-04). Seterusnya, Yang Arif Malik mengambil alih dan membicarakan permohonan menghina mahkamah terhadap pemohon-pemohon dan E mendapati mereka bersalah kerana menghina mahkamah dan memerintahkan setiap satu dipenjarakan selama tiga minggu dan disaman RM15,000 ('Perintah Yang Arif Malik'). Pemohon-pemohon memfailkan rayuan terhadap keputusan ini dengan Mahkamah Rayuan (W02-34-07). Empat tahun selepas Perintah F Pemindaan Yang Arif Azmel, plaintif memfailkan permohonan untuk memadamkan Perintah Pemindaan Yang Arif Azmel. Permohonan ditolak atas alasan bahawa permohonan tidak memenuhi A. 42 k. 13 Kaedah-kaedah Mahkamah Tinggi 1980 ('Perintah Pesuruhjaya Kehakiman Yazid').Tidak puas hati, plaintif merayu kepada G Mahkamah Rayuan. Keempat-empat rayuan tersebut dibicara bersama dan keputusan-keputusannya adalah seperti berikut (i) rayuan terhadap Perintah Pertama Yang Arif Hakim ditolak atas alasan bahawa hakim bicara telah menggunapakai prinsip undang-undang yang betul; (ii) rayuan terhadap Perintah Pemindaan Yang H Arif Azmel dibenarkan atas alasan bahawa sebaik sahaja hakim bicara memberikan perintah beliau adalah *functus officio*; (iii) rayuan pemohon-pemohon terhadap Perintah Yang Arif Hakim Malik untuk penghinaan mahkamah ditolak atas alasan bahawa hakim bicara telah dengan betul membuat kesimpulan bahawa terdapatnya I penghinaan mahkamah oleh pemohon-pemohon dan (iv) rayuan

A plaintif terhadap Perintah Pesuruhjaya Kehakiman Yazid dibenarkan atas alasan terdapat merit di dalam aduan plaintif. Pemohon-pemohon memohon kebenaran rayuan kepada Mahkamah Persekutuan di bawah s. 96(a) Akta Mahkamah Kehakiman 1964.

B **Diputuskan (menolak permohonan kebenaran rayuan kepada Mahkamah Persekutuan)**
Oleh James Foong HMP menyampaikan penghakiman mahkamah:

(1) Permohonan ini sepatutnya ditolak atas alasan bahawa ia tidak memenuhi peruntukan-peruntukan s. 96(a) Akta Mahkamah Kehakiman 1964. Ia adalah undang-undang mantap bahawa seorang hakim akan *functus officio* sebaik sahaja beliau menyerahkan penghakiman. Pihak yang tidak puas hati dengan penghakiman boleh membuat rayuan. Hakim tersebut tidak boleh meminda penghakimannya sendiri kecuali di bawah 'slip rule' (A. 42 k. 5 Kaedah-Kaedah Mahkamah Tinggi 1980) atau terlingkung dalam pengecualian yang dinyatakan di dalam *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd.* Tiada satu daripada pengecualian-pengecualian ini boleh digunapakai. (para 19)

(2) Oleh kerana Perintah Pertama Yang Arif Azmel adalah efektif, tidak wujud apa-apa untuk melarang satu hakim berikutnya mendengar dan membuang prosiding penghinaan terhadap pemohon-pemohon. Oleh itu, Perintah Yang Arif Hakim Malik berdiri dengan betul. Perintah Pertama Yang Arif Hakim bukanlah 'tidak menentu, samar atau kabur-kabur'. Ia adalah jelas dan tepat. Walaupun injunksi mandatori diketepikan oleh hakim yang memerintahkannya, faktanya adalah tindakannya adalah salah *ab initio*. (para 21)

(3) Oleh kerana prinsip-prinsip undang-undang bagi membenarkan dan menolak injunksi interim adalah mantap dan dibincang dengan sepenuhnya dan digunapakai oleh mahkamah-mahkamah, tidak wujudnya persoalan atau undang-undang baru atau tidak terdapat persoalan kepentingan awam untuk meluahkannya. (para 22)

Case(s) referred to:
American Cynamid Co v. Ethicon Ltd [1975] AC 396 ***(refd)***
Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***
Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 96(a)
Rules of High Court 1980, O. 42 rr. 5, 13

For the appellant - Hj Sulaiman (A Nedu Maran with him); M/s Nedu & Partners
For the respondent - Ashokvijay J Sangharajka (Paari Perumal with him); M/s TK Wong, Tan & Assocs

[Appeal from Court of Appeal; Civil Appeal No: W-02-34-07]

Reported by Suhainah Wahiduddin

JUDGMENT

James Foong FCJ:

Introduction

[1] Enclosure 2(a) is an application by the applicants who were the directors of the defendant for leave to appeal to the Federal Court under s. 96(a) of the Courts of Judicature Act 1964.

[2] To appreciate this application I shall commence by disclosing the facts of this case and shall in the course of this refer to the parties in their original capacity as in the court of first instance.

Facts

[3] The plaintiff has instituted a writ action in the High Court against a housing development company (the defendant) for damages caused to his house which was adjacent to the land where the defendant was constructing 26 units of double story terrace houses. Aside from the damages sought, the plaintiff also prayed for injunction to restrain the defendant from (a) carrying out further development on the adjacent land and; (b) requiring the defendant to forthwith carry out repairs to his house.

[4] Subsequently, the plaintiff applied and successfully obtained an interim injunction for the prayers sought. This order was granted by Justice Azmel. For ease of reference I shall refer to this order as the "Justice Azmel's First Order". The Justice Azmil's First Order is both prohibitive and mandatory in nature.

[5] Dissatisfied with this order, the defendant filed an appeal to the Court of Appeal. This appeal carries the Court of Appeal registration number W 02-207-04.

[6] Due to the failure of the defendant to comply with the mandatory order to repair the plaintiff's house, the plaintiff filed an application to commit the applicants (who were the directors of the defendant) for contempt. But before this application can be disposed by the court, the defendant filed an application to query whether the mandatory aspect of the injunction was indeed granted.

[7] The application to query Justice Azmel's First Order was heard by the same judge who from his notes of evidence recorded:

> I am satisfied that I have the power to review my previous decision and to amend it if I am satisfied that the existing order is wrongly made. In respect of the order made by this Court, I only made the stop work order. As to the mandatory order I could not have given it because the facts as to what caused the damage to the Plaintiff's premises were in dispute. As hearing to determine the cause of the cracks to the house has to be conducted first.

[8] Dissatisfied with this "Justice Azmel's Variation Order", as I shall from now on be referring to, the plaintiff filed an appeal to the Court of Appeal and this bears Court of Appeal number W-02-1021-04.

[9] Subsequently, Justice Azmel recused himself from hearing this case. Justice Malik Ishak took over and heard the contempt application against the applicants. He found both the applicants guilty of contempt and ordered each to serve three weeks imprisonment and a fine of RM15,000 each, in default one month imprisonment. For ease of reference, I shall be referring to this order as "Justice Malik's Order". The applicants filed an appeal against this decision with the Court of Appeal.

It is registered as W-02-34-07. In the meantime, the applicants paid the fine and obtained a stay on the custodial sentence.

[10] Some four years after Justice Azmel's Variation Order, the plaintiff filed an application to expunge Justice Azmel's Variation Order. This was heard by yet another judge, judicial commissioner Mohd Yazid Mustapha. This application was dismissed on the ground that the application fell short of O. 42 r. 13 Rules of High Court in that this was made after 30 days from the date of Justice Azmel's Variation Order. I shall refer to this order made by the judicial commissioner as the "Judicial Commissioner Yazid's Order".

[11] Dissatisfied with the Judicial Commissioner's Yazid's Order, the plaintiff appealed to the Court of Appeal. This carries registration number W-02-1098-08.

Court Of Appeal

[12] With the consent of parties, the four appeals listed above were heard together. The following are the decisions and a summary of the grounds.

[13] For appeal number W-02-207-04, which is an appeal by the defendant against the decision of Justice Azmel's First Order, it was dismissed on the ground that the trial judge has applied the correct principles of law (*American Cynamid Co v. Ethicon Ltd* [1975] AC 396 and *Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah & Ors* [1995] 1 CLJ 293) to the facts of the case and there is no reason to disturb the finding so made.

[14] For appeal number W-02-1021-04 by the plaintiff against Justice Azmel's Variation Order, it was allowed on the ground that once the trial judge has pronounced his order he is *functus officio* and he (the judge) "has no power to review, rehear, vary or set aside part of any judgment once it has been formally recorded".

[15] In respect of appeal number W-02-034-07 by the applicants against Justice Malik's Order for contempt, it was dismissed on the ground that the trial judge has correctly arrived at a conclusion that there was contempt by the applicants since they: "have had full knowledge of the intent and purpose of the order of Azmel Maamor J but decided not to obey it. At the contempt proceedings they did not claim ignorance of the terms of the order on the ground of ambiguity. Neither did they raise the issue that the mandatory injunctive order had been side aside".

[16] And for the last appeal W-02-1098-08, which is an appeal by the plaintiff against Judicial Commissioner Yazid's Order, it was allowed on the ground that there "is merit on the plaintiff's complaint ... The learned Judicial Commissioner should have approved the order agreed by the parties".

Questions Posed

[17] In the applicants' written submission, four questions were proposed to the Federal Court:

> 9.1 Whether on the face of an admission by the High Court Judge of a mistake in the granting and/or sealing of a interlocutory mandatory order as in the instant proceedings, the correct test for the Court of Appeal hearing the appeal against the said interlocutory mandatory order ought to be confined to

established principles enunciated in *American Cynamid Co v. Ethicon Ltd* [1975] AC 396 and/or *Keet Gerald Francis Noel John v. Mohd Noor @ Harun bin Abdullah & 2 Ors* [1995] 1 CLJ 293 or should it also include the consideration of the admission of mistake.

9.2 Whether the High Court Judge has the jurisdiction and/or power to hear and determine a formal application to review and/or set aside an order of the same High Court Judge if he is satisfied that the said order was wrongly made and did not reflect his true intention.

9.3 If the Honourable Court decides that the Learned High Court Judge had in fact the jurisdiction and/or power in circumstances mentioned in Question 9.2 above, whether it was competent for another High Court Judge to find the party affected by such order was in contempt of Court for failure to comply with such order.

9.4 Whether the High Court Judge hearing contempt proceedings for non-compliance of a court order, ought to have taken into his consideration that the said court order was wrongfully made.

9.5 If this Honourable Court decides on any one of the above questions in favour of the Applicants herein, ought not this Honourable Court set aside the orders of committal made by the Learned High Court Judge on 2-12-2006 and the order of the Court of Appeal on 16-7-2009.

[18] Apart from these, the applicants' counsel during the hearing of this application before us added another question:

> Whether a finding of guilt of contempt of court for non-compliance of an interlocutory mandatory order, which has penal consequences affecting a person's liberty, can be sustained in the instance where the terms of the said order are uncertain vague and ambiguous and where the mandatory order has been set aside subsequently by the same Judge who originally granted the Order.

Analysis

[19] It is my view that this application should be dismissed for reason that it does not fulfil the provision of s. 96(a) of the Courts of Judicature Act which says:

> ... an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court:

(a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be public advantage.

[20] It is a well established law that a judge is *functus officio* once he has delivered his judgment. A party who is dissatisfied with this judgment can appeal against it. The said judge cannot vary his own judgment except under the 'slip rule' (O. 42 r. 5 of the Rules of High Court) or within the exceptions expressed in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75. In this case neither of these exceptions applies.

[21] Since Justice Azmel's First Order is effective, there is nothing to prohibit a subsequent judge to hear and dispose of the contempt proceedings against the applicants. Thus, Justice Malik's Order stands correctly made.

[22] I do not agree that Justice Azmel's First Order is "uncertain, vague and ambiguous" as described in the additional question posed. To me, it is clear and precise: "satu injunksi di mana defendan diperintahkan dengan serta-merta untuk memperbaiki segala kerosakan atau keretakan di rumah plaintif yang telah diakibatkan oleh kerja-kerja pembinaan di tapak binaan tersebut". Though the mandatory injunction was set aside by the judge who made it, the fact remains that his act is wrong *ab initio* and thus cannot be sustained.

[23] Since legal principles for the granting or refusal of an interim injunction are well established and fully discussed and applied by the courts below, I am of the opinion that there is no new question of law nor is there any question of public importance to regurgitate it.

Conclusion

[24] Accordingly, this application for leave to appeal to the Federal Court is dismissed with costs.

[25] My learned brother judge, Alauddin Dato Mohd Sheriff, and sister judge, Heliliah Mohd Yusof, have read this judgment in draft and associate themselves with the contents.